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SUPREME COURT, U. S.

No. 486

In the Supreme Court of the United States

OCTOBER TERM, 1966

JOS. SCHLITZ BREWING COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA
and
GENERAL BREWING COMPANY,
Appellees.

On Appeal from the United States District Court
for the Northern District of California
Southern Division

Motion for Leave to File a Brief as Amici Curiae
and
Brief of Amici Curiae

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September 22, 1966

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Philip A. Ray and George Alef, as minority Directors of General Brewing Corporation elected by over 300 shareholders (owning more than 30% of General's shares worth over $3,000,000 at current market values), together with Lewis B. Reynolds, a shareholder of Capital Estates, Inc., individually and on behalf of all other minority shareholders of Capital Estates (owner of 47.5% of the stock of General Brewing), respectfully move for leave to file the attached brief as amici curiae. Consent to the filing

of a brief as amici curiae, though requested, was summarily denied by the attorneys for the United States and General Brewing. Attorneys for Jos. Schlitz Brewing Company have neither consented nor refused consent because time did not permit submission of our brief to them in advance of the filing of this motion.

We believe probable jurisdiction should be noted by the Court and that the views of amici should be heard. Fundamental questions, not presented to the District Court, relating to the rights of affected shareholders in divestiture proceedings are presented herein. No one presently before this Court is capable of, inclined to, or did in fact present the interests of such shareholders to the court below. This case is representative of the growing volume of divestiture proceedings involving complex inter-corporate structures designed to maintain control by one corporation over other publicly-held operating companies. Where, as here, more than one method of complete divestiture is available to cure the anti-competitive condition found by the District Court to exist, the selection of the method should be made only after full consideration, not only of the effect upon the corporate parties litigant, but of its impact upon their unrepresented and innocent public shareholders.

The District Court, considering only the remedies suggested by those representing the limited interests before it, concluded that divestiture by Schlitz of its shares in John Labatt Limited, a Canadian corporation, rather than the divestiture of Labatt's control of General, was the appropriate remedy here. In reaching this determination, the court invited and received, in addition to those of the parties actually before it, the views of Labatt, one of the shareholders of General Brewing and Capital Estates. It did not seek the views of any other shareholders of Gen-

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The United States has subsequently consented to the filing

eral or Capital Estates. Inasmuch as Labatt controls General, the purported position of General as presented to that court was, of course, identical to that of Labatt—that Labatt control of General was beneficial to General. Put another way, the voice heard in the trial court was not that of General Brewing Corporation but only that of a self-interested shareholder. On behalf of other shareholders of General and Capital Estates—neither represented nor heard in the court below—we strenuously dispute the Labatt position. Labatt's only interest is self-interest. This was shown by the testimony of its officers before the District Court that "it intended to use General Brewing as a vehicle" for expanding Labatt's operations in the United States and that it did not propose to use its funds in doing so. It has exercised and is exercising its control to the severe and continuing detriment of General and of the other General shareholders.

We move this Court to grant leave to file the attached amici curiae brief and urge that the Court give plenary consideration to the question of whether or not the rights of all stockholders of the corporations involved were afforded proper consideration.

Respectfully submitted,

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Brief of Amici Curiae

STATEMENT OF INTEREST

1. Identity of Amici.

This brief is filed by Philip A. Ray and George Alef, minority directors of General Brewing Corporation (sued herein as General Brewing Company), together with Lewis B. Reynolds, a shareholder of Capital Estates, Inc. (owner of 47.5% of the shares of General Brewing), individually and on behalf of all other minority shareholders of Capital Estates, Inc.

2. The Multi-corporate Control Structure.

The capital stock of General Brewing Corporation is held in the following manner:

16.1% by John Labatt Limited, a Canadian corporation
47.5% by Capital Estates, Inc., a Delaware corporation
36.4% by approximately 600 unorganized shareholders.

In addition to its outright 16.1% ownership in General, Labatt owns 59.7% of the stock of Capital Estates. It thus has majority control of that corporation and by virtue of the latter's 47.5% interest in General, Labatt controls General although it does not own a majority in beneficial interest of General's shares. The majority beneficial interest is owned by over 1,200 public shareholders of General and Capital Estates.

3. The Complaint and Temporary Restraining Order.

When Schlitz acquired effective control of Labatt by purchasing 39% of its stock, the government commenced action against Schlitz and General asserting violation of Section 7 of the Clayton Act by virtue of Schlitz's effective control over General through Labatt. The District Court immediately enjoined Schlitz's exercise of its stock rights in Labatt, thus giving control of Labatt, Capital Estates and General Brewing to an unidentified minority of Labatt.

4. The Trial Court's Actions in the Light of the Record.

After trial, the District Court concluded that control by Schlitz of General violated Section 7 of the Clayton Act and, in fashioning a decree, considered the views expressed by the parties, i.e. the government, Schlitz and General (really Labatt), and then invited Labatt's view as if Gen-

eral were independent of Labatt, and as if Labatt were representative of all shareholders of General and could represent their best interests. The views of the other owners of stock in General and Capital Estates were not represented to the court nor was the effect of the decree on them considered. Predictably, Labatt directly and through General, took the position that Labatt's control of General was good for General. The court so found, notwithstanding that since the acquisition by Labatt of control of General, the business affairs of General have deteriorated year by year without exception. Annual earnings of General have declined as follows:

1958	$3,945,000
1959	$3,738,000
1960	$2,673,000
1961	$1,605,000
1962	$1,354,000
1963	$1,150,000
1964	($ 827,000)
[Net Loss After Tax Credit of $1,112,000]	
1965	($2,319,850)
[Net Loss After Tax Credit of $1,629,000]	

Moreover, from November 1, 1961, through May 31, 1965, Labatt charged General Brewing over $300,000 for consultation and research supposedly furnished General by Labatt, notwithstanding General's sales and earnings severely declined through that period. In addition, Labatt caused General Brewing to produce and market Labatt's beer in General's market area at a true cost burden to General of more than $1,000,000 to date. None of this cost will be recovered since General's sales of Labatt's beer are now trifling and have been virtually discontinued.

Labatt's control of General has been injurious to General and its shareholders and the shareholders of Capital Estates, and has decreased General's competitive position in California, its primary market area, and a market area in which, during the same period, total beer sales increased by more than 31%.

5. Labatt's Suppression of any Voice for General's Shareholders.

The judgment of the District Court herein was entered on March 24, 1966. On April 5, 1966, at the annual meeting of the stockholders of General Brewing Corporation, Philip A. Ray and George Alef were, after a proxy contest with Labatt, elected directors of General for the first time by over 300 independent, non-Labatt shareholders who own over 80% of the non-Labatt controlled shares. The other six of General's eight directors were nominated by Labatt and elected by its use of its control of General. Of these six directors, four are presently officers and/or directors of Labatt. Among those 300 non-Labatt shareholders are Mr. Paul Kalmanovitz, a principal shareholder and officer of Maier Brewing Company of Los Angeles, which is engaged in the manufacture, sale and distribution of beer in California. Mr. Alef is administrative assistant to Mr. Kalmanovitz, president of Maier Brewing. Mr. Ray is an attorney at law, admitted to practice for over thirty years in the State of California, a member of the Bar of this Court and a former Under Secretary of Commerce of the United States. Mr. Ray is not employed by, nor is he a shareholder, officer or director of Maier Brewing Company.

Following April 5, 1966, no meetings of the board of directors of General Brewing Corporation were called until July 30, 1966, though they were requested by Directors

Ray and Alef. On August 30, 1966, Messrs. Ray and Alef first learned that General Brewing Corporation intended to take in its motions and briefs to this Court, the position that control of General by Labatt was advantageous and beneficial to General. Thereafter, on about September 2, 1966, pursuant to requests by Mr. Ray, all of the directors of General were furnished copies by General's counsel of the Jurisdictional Statement filed herein by Jos. Schlitz Brewing Company.

On September 7, 1966, Messrs. Ray and Alef, in accordance with the by-laws of General, called a special meeting of its board of directors, held September 14, 1966, and moved adoption of resolutions to the effect that General refrain from taking the position that control by Labatt was beneficial to General. This motion was defeated by a six-to-two vote, Messrs. Ray and Alef voting in favor of said motion and the Labatt-controlled directors voting against it. Thereupon, in retaliation, the Labatt directors caused adoption of several resolutions severely restricting the voice of non-Labatt shareholders and directors in the management of the corporation. At the same meeting, after prior written request, General's management even refused to tell its minority directors the amount of General's expenses incurred in connection with this litigation—expenses incurred in large part for the purpose of maintaining Labatt's control of General—on the ground that they were not known.

Amici curiae have no interest in Schlitz, nor any interest in the ultimate outcome herein as it may affect Schlitz. Messrs. Ray and Alef, as directors, do have an obligation and duty as fiduciaries for all of the shareholders of General Brewing Corporation. In the opinion of all amici, Labatt's control of General is disadvantageous in the ex-

treme to General and Capital Estates and beneficial only to Labatt.

ARGUMENT

1. The Question of Divestiture in the Light of the Record.

The District Court found that Schlitz's indirect control of General through Labatt was violative of Section 7 of the Clayton Act. The appropriate remedy had to be selected in the light of a record that showed:

A. During the years General had been controlled by Labatt, it steadily declined as a factor in the market.

B. Labatt while wanting General as a vehicle for expanding *Labatt's* operation in the United States was unwilling to utilize Labatt funds to further this purpose.

C. Labatt's control of General was structured through other controlled corporations in such a manner that while controlling 63% of the stock, its beneficial ownership was less than 50%.

2. The Proposals Presented.

The parties litigant urged alternative proposals either of which would have seemingly cured the violation. Schlitz sought to retain its interest in Labatt and cause Labatt to dispose of its interest in General Brewing in any manner satisfactory to the government. The government, supported by General Brewing, insisted upon Schlitz's divestiture of its interest in Labatt. The District Court invited Labatt, but no other shareholder of General or Capital Estates, to be heard.

3. The Right of Affected Parties to Be Heard.

This Court has long recognized that in fashioning antitrust remedies, district courts must consider the impact of their decrees upon privately-held interests. *United*

States v. American Tobacco Co., 221 U. S. 106, 185 (1911); *United States v. E. I. du Pont de Nemours & Co.*, 366 U. S. 316, 327-28 (1961).

Further, where there exist two or more alternate methods of complete divestiture, the hardship or consequences of each on shareholders and others affected should be considered, and if both alternate remedies are equally effective, such hardship and consequences should be determinative. In a case such as this, where Labatt is unable, because of a conflict of interest with its co-shareholders of General and Capital Estates, to properly represent their interests, the court below should have appointed amici to express the views of those shareholders. (Compare *United States v. E. I. du Pont de Nemours & Co.*, 177 F.Supp. 1, 6 (N.D. Ill., 1959); rev'd 366 U. S. 316 (1961), where the District Court appointed two amici curiae to represent the du Pont stockholders and the General Motors stockholders. Their views were considered both by the District Court and this court.)

4. Labatt's Disability to Speak for Any Shareholders.

A. CONFLICT OF INTEREST

Patently Labatt had, and has, a conflict of interest with those other shareholders and could not, nor can it now, nor can its controlled General Brewing management, be said to have fairly spoken for such shareholders. As indicated previously, those other shareholders include people active in and knowledgeable about the beer industry. Their views on the competitive effect of and desirability of Labatt's control of General should have been considered, certainly where as here the uncontroverted facts in the record show that General, under the control of Labatt, instead of continuing to be a viable competitor, has become

an ever-decreasing factor in the market, with concomitant red ink on its financial statements and a decline in its over-all value.

B. LABATT'S PURPOSE

Labatt's aim and purpose is clear, as even the testimony of its officers in the court below shows. They testified that Labatt intended "to use General as a vehicle" for expanding *Labatt's* operations into the United States. (253 F.Supp. at 147.) They also admitted that Labatt was not prepared to give General fiscal aid or assistance.

Use of a corporation by the controlling stockholder as "a vehicle" for that stockholder's particular advantage, none of which will accrue to the benefit of the other stockholders, is a patent injustice to the latter group which cannot be countenanced, even in the name of competition.

C. THE VOICE HEARD

Significantly the Labatt voice heard by the court below, directly or through General Brewing, speaks at the most for a minority, non-controlling group of Labatt stockholders, since the control block of Labatt stock is held by Schlitz. Accordingly, if that court's decree is allowed to stand and Schlitz divests itself of control of Labatt, Labatt's assurances of Labatt's future plans for General Brewing, upon which the District Court's decision was largely based, are subject to change by the person purchasing control of Labatt.

While in the ordinary case it might be sufficient to say that the corporate management speaks for all of the stockholders, that is clearly a superficial and wholly insufficient answer here. The present General management was selected

by and is controlled by Labatt, another large brewer. That management is violently hostile to any who dare oppose the Labatt-dictated direction of General as is demonstrated by the recent resolutions precipitately adopted by its board of directors, including one which increased from two to three the number of directors required to call meetings of directors. As there are only two non-Labatt members on the board, those members are now unable even to make their voices heard unless the Labatt majority deigns to call a board meeting.

5. The District Court's Implicit Sanction of Labatt's Overreaching.

The obvious implication of the foregoing is that one block of shareholders of General feel that Labatt's control is not only bad for General, but that Labatt is affirmatively using General, not for the best interests of General and all its stockholders, but for the best interests of Labatt. While this statement of the situation would ordinarily suggest the institution of a shareholders' derivative action, the District Court, with the salient facts before it as to the actions of Labatt vis-a-vis General, has determined that Labatt's activities are good for General (or at least for competition, if not for General). Without giving the other stockholders an opportunity to be heard, it is giving the imprimatur of the United States District Court to Labatt's acts and is sacrificing those other stockholders' interests on the altar of possible prospective competition. We do not quarrel with the power of courts to harshly affect the interests of third parties in the name of competition, nor even the desirability of so doing under circumstances that require it to be done, to remedy violations of the antitrust laws. We do submit, however, that the parties affected should be heard.

6. An Additional Consideration Requiring That Stockholders Be Heard.

The appropriateness of hearing from the other shareholders of General and/or of Capital Estates is enhanced when one considers that the enjoining of Schlitz's voting of Labatt shares gave control of Labatt, Capital Estates and General to a minority of Labatt, whereas, if the court had sterilized not only the Schlitz voting of the Labatt stock, but sterilized as well the power represented by that stock in the inter-corporate structure, control of General would have passed to the very people now asking to be heard, people who would have presented the court with far different views as to the competitive effect or the desirability of Labatt's control of General. We are not saying that the granting of the temporary restraining order was error—rather that having selected that form of order the court should have heard from all affected persons—or that they now, at least, be heard from. The fiction of separate corporate entities was ignored in determining whether a violation of the antitrust laws occurred, but then in determining the remedy to be applied to govern the future the court acted as if the corporations were independent of their shareholders.

CONCLUSION

The decree of the District Court was formulated and rendered without regard for the rights of and duties owed to minority shareholders. It is submitted that the Court should note probable jurisdiction in order to give plenary consideration to the question of whether the rights of all of the shareholders concerned have been adequately considered and protected, appointing, if it appears necessary

or desirable, additional amici curiae to represent the interests of such shareholders.

Respectfully submitted,

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